

JULIA URQUIDI

VS.

TRINITY MANOR ADULT CARE HOME

AND

KANSAS ASSOC. OF HOMES OF THE AGING

Insurance Carrier

ORDER

Claimant requested review of the December 28, 1999, Order entered by Administrative Law Judge Pamela J. Fuller. The Appeals Board heard oral argument on May 12, 2000.

ISSUES

This is a post-award proceeding for penalties under K.S.A. 44-512a, interest under K.S.A. 44-512b, and for attorney fees pursuant to K.S.A. 1999 Supp. 44-536(g). Claimant asserts the Administrative Law Judge erred in finding she was "without the authority or jurisdiction to grant the relief requested by the Claimant."¹ Claimant's motion alleges respondent failed to pay the award of permanent partial disability benefits as required by K.S.A. 1999 Supp. 44-556. Respondent contends its obligation to pay benefits is limited to only those benefits that become due during the ten-week period preceding the Appeals Board's decision and during the pendency of the appeal to the Court of Appeals, and that no such benefits were due for this time period.

¹ Although not mentioned in her Order, the transcript of the December 23, 1999 proceedings reflects that the ALJ was also denying claimant a hearing on her motion because the ALJ did not have the administrative file. Although the Court of Appeals had the original hearing and deposition transcripts in its possession as a part of the record on appeal, most if not all of the pleadings were available from the Division of Workers Compensation, if not from the parties themselves. Moreover, a copy of the Board's April 13, 1999 Order together with the parties' acknowledgment that there had been a timely appeal to the Court of Appeals, and a demand for payment made upon respondent, are all that were needed to decide the issues presented by claimant's motion.

During oral argument to the Board, the parties agreed that if the Board determines the ALJ erred in not deciding the claimant's motion on the merits, then the Board could proceed to do so without first remanding the matter to the ALJ for a determination and order. As to the question of a reasonable attorney fee, however, the respondent requested a remand to the ALJ for a hearing on that issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The pendency of an appeal of an award to the Court of Appeals does not divest an administrative law judge of jurisdiction to decide post-award matters.² The terms of K.S.A. 1999 Supp. 44-556(b) itself reflect that the legislature contemplated that there be a procedure to enforce the payment of the benefits it provides be paid during the pendency of an appeal.³ Therefore, the ALJ's Order should be reversed and this matter remanded to the ALJ for further proceedings on the claimant's attorney fee request.

On February 20, 1998, Administrative Law Judge Kenneth S. Johnson entered an award denying permanent partial disability benefits which was timely appealed to the Appeals Board. On April 13, 1999, the Appeals Board determined the award of the ALJ should be modified to award permanent partial disability benefits but based upon a 10 percent impairment of function rather than a work disability or the permanent total disability alleged by claimant. Both claimant and respondent appealed the decision of the Appeals Board to the Kansas Court of Appeals. On October 8, 1999, demand for payment pursuant to K.S.A. 44-512a was sent by claimant's counsel to respondent and its insurance carrier. Subsequently, the claimant filed a Motion for Penalties and for Interest on Compensation and requested attorney fees.

Following the Appeals Board's prior decisions,⁴ we determine no benefits are due claimant under K.S.A. 1999 Supp. 44-556 because all weekly permanent partial disability benefits became due before the ten-week period next preceding the entry of the Board's Order.

² See Casebeer v. Alliance Mutual Casualty Co., 203 Kan. 425, 454 P.2d 511 (1969); Teague v. George, 188 Kan. 809, 365 P.2d 1087 (1961).

³ See *also* e.g. K.S.A. 1999 Supp. 44-556(g).

⁴ Landry v. Graphic Technology, Inc., WCAB Docket No. 216,166 (Nov. 1998); Byers v. Morton Buildings, Inc., WCAB Docket No. 173,408 (May 1998); Britt v. Theratronics International, Ltd., WCAB Docket No. 184,811 (Aug. 1997); Hamrick v. Arabian Horse Express, WCAB Docket No. 183,004 (Feb. 1997); Cassady v. Metz Baking Company, WCAB Docket No. 162,695 (Feb. 1996).

Before the 1993 amendments, K.S.A. 44-556(c) read in pertinent part, "[i]f review of the decision of the district court is sought . . . the compensation payable under the decision of the district court shall not be stayed pending such review." However, in 1993 K.S.A. 44-556 was amended. K.S.A. 1999 Supp. 44-556 now provides, in pertinent part:

"(b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review."

Contrary to her arguments before the ALJ, claimant now argues K.S.A. 1999 Supp. 44-556(b) should be read to require a lump-sum payment of compensation rather than payment of compensation for only the ten-week period preceding the Appeals Board's April 13, 1999, decision and during the pendency of the appeal to the Court of Appeals. Claimant asserts that because all weekly benefits were past due and payable more than ten weeks before the Board's Order, they were likewise due during that ten-week period. The Board disagrees with this interpretation of the language of the statute. Granted, the intent of K.S.A. 1999 Supp. 44-556 is for claimant to receive weekly benefits during the pendency of an appeal, but to require payment of a lump sum award goes beyond this intent. The problem is created in part by the accelerated payout formula under K.S.A. 44-510e that took effect July 1, 1993. Before then, permanent partial disability benefits were paid out over 415 weeks and, therefore, were much more likely to still be ongoing at the time of an appeal to the Court of Appeals. But to interpret K.S.A. 1999 Supp. 44-556 to require payment of weekly compensation that became due before "the ten-week period next preceding the board's decision" goes beyond the rules of statutory interpretation. In the Board's opinion, claimant's remedy lies with the legislature.

The Appeals Board finds a lump-sum payment of compensation was not due under K.S.A. 1999 Supp. 44-556. Therefore, respondent did not fail to pay compensation when due as contemplated by K.S.A. 44-512a. Penalties would also not be appropriate under K.S.A. 44-512a because the decision of the Appeals Board was not final before the appeal to the Court of Appeals was filed.

It is noted that the Court of Appeals entered its decision in this case on April 28, 2000, affirming the Appeals Board's decision.

WHEREFORE, it is the decision of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller entered December 28, 1999, should be, and is hereby, reversed, claimant's request for penalties and interest is denied and this matter is remanded to the Administrative Law Judge for further proceedings and orders on claimant's request for attorney fees.

IT IS SO ORDERED.

JULIA URQUIDI

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DOCKET NO. 186,568

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director